



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Highway Administration**

**[FHWA Docket No. FHWA-2016-0027]**

#### **Revision of Form FHWA-1273**

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Notice of availability.

**SUMMARY:** This final notice announces the availability of revised Form FHWA-1273—“Required Contract Provisions Federal-Aid Construction Contracts.” This form includes certain contract provisions that are required on all Federal-aid construction contracts other than Appalachian construction contracts. This form also includes proposal notices that Federal-aid recipients must incorporate or reference in all solicitation-for-bids or request-for-proposals documents for Federal-aid construction projects.

**DATES:** The revised Form FHWA-1273 is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

Consistent with FHWA’s regulations at 23 CFR Part 633, Subpart A, Federal-aid contractors and recipients must use the new form beginning on this date.

Federal-aid recipients must use the new form on this date.

**FOR FURTHER INFORMATION CONTACT:** Brian Hogge, Office of Infrastructure, (334) 399-0081, [Brian.Hogge@dot.gov](mailto:Brian.Hogge@dot.gov) or Michael Harkins, Office of the Chief Counsel, (202) 366-1523, [Michael.Harkins@dot.gov](mailto:Michael.Harkins@dot.gov). Office hours for FHWA are from 8:00 a.m. to 4:30 p.m., eastern, Monday through Friday, except Federal holidays.

#### **SUPPLEMENTARY INFORMATION:**

##### **Electronic Access**

An electronic copy of this notice and all background material may be viewed online at [www.regulations.gov](http://www.regulations.gov) using the docket number listed above. A copy of this notice will be placed in the docket. Electronic retrieval help and guidelines are available on the Website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's Website at [www.FederalRegister.gov](http://www.FederalRegister.gov) and the Government Publishing Office's Website at [www.GovInfo.gov](http://www.GovInfo.gov).

## **Background**

On November 28, 2016, at 81 FR 85673, FHWA published a notice and request for comments regarding FHWA's proposal to revise Form FHWA-1273. As provided in 23 CFR 633.103, Form FHWA-1273 includes contract provisions and proposal notices that are required by regulations promulgated by FHWA or other Federal agencies. The provisions include nondiscrimination, prevailing wage rates, subcontracting, job-site safety, and other important requirements that must be included in every Federal-aid construction contract other than Appalachian construction contracts. According to 23 CFR 633.104(a), FHWA will update the form as regulatory revisions occur. Since Form FHWA-1273 was last revised on May 1, 2012, a number of revisions have occurred that necessitate the revision of the form.

## **Discussion of Comments**

### *I. Summary*

All comments received in response to the notice and request for comments have been considered in adopting this final notice. Comments were received from four representatives of four State departments of transportation (State DOT). The following discussion identifies and summarizes the major comments submitted in response to the November 28, 2016, notice, as well as FHWA's response to those comments.

### *II. Analysis of and Response to Comments by Section*

## Section II. Nondiscrimination

*Comment:* A representative of the Wyoming DOT recommended not to incorporate the provisions of DOT Order 1050.2A, Appendixes A and E, into the required assurances in Section II.10.c. The commenter stated some of the provisions in DOT Order 1050.2A, Appendixes A and E were not applicable to Federal-aid construction projects.

*FHWA Response:* The FHWA does not agree with this comment. All entities receiving federal financial assistance must comply with Title VI and all applicable federal civil rights statutes and implementing regulations. DOT's regulations implementing Title VI of the Civil Rights Act of 1964, require, at 49 CFR 21.7(a)(1), every recipient of Federal financial assistance to submit an assurance that the program or facility supported by such assistance will be conducted or operated in compliance with all requirements imposed by or pursuant to DOT's Title VI regulations. DOT's Title VI regulations at 49 CFR 21.7(a)(1) also direct the Secretary to specify the form of the required assurances, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, among others. In accordance with this direction, DOT Order 1050.2A, issued April 24, 2013, sets forth the form of Title VI assurances required of DOT recipients and contractors working on Federal-aid contracts.

The FHWA, as a modal operating administration of DOT, is required to secure from applicants and recipients receiving Federal financial assistance the Standard Title VI Assurances and Nondiscrimination provisions included in DOT Order 1050.2A. Specific Assurance number 3 in the Order requires FHWA recipients to insert the clauses of Appendix A and E in every contract or agreement subject to the cited acts and regulations. For the purpose of this Notice, FHWA is interpreting the word "insert" to allow references to the requirements of DOT Order 1050.2, Appendix A and E in contracts and agreements subject to the General provisions of Form FHWA-1273 (*see I. General, Section 1*).

During the public review and comment period associated with the November 28, 2016, Federal Register notice and request for comments, FHWA received an internal comment that the proposed revisions to the first sentence in Section II, 1. Equal Employment Opportunity resulted in reduced clarity. To maintain clarity and consistency, FHWA is not implementing the proposed revision to this sentence.

#### Section IV. Davis-Bacon and Related Act Provisions

*Comment 1:* A representative of the Florida DOT recommended that the language, “(W)here the applicable law requires that projects be treated as a project on a Federal-aid highway,” be changed to, “All projects (excluding those funded under the recreational trail set-aside) will be treated as if on a Federal-aid highway.”

*FHWA’s Response 1:* The FHWA does not agree with this comment. The proposed language is consistent with the statutory provisions for the applicability of prevailing wage rate requirements. Under 23 U.S.C. 113 and FHWA’s implementing guidance, prevailing wage rate requirements are applicable to Federal-aid construction projects within the right-of-way of a Federal-aid highway (this excludes roadways functionally classified as local roads and rural minor collectors). In addition, the statutory language authorizing certain transportation programs requires projects using these program funds to be treated as if on a Federal-aid highway. Examples include: the Surface Transportation Block Grant Program provision in 23 U.S.C. 133(i) [excluding recreational trails projects under subsection (h)(5)]; the Nationally Significant Freight and Highway Projects provision in 23 U.S.C. 117(k); and the National Highway Freight Program in 23 U.S.C. 167(l). Thus, Federal-aid projects using these specific funds, but not all projects, must be treated as if the project were on a Federal-aid highway and, therefore, prevailing wage rate requirements apply regardless of the location of the project.

*Comment 2:* The Minnesota DOT recommended that the proposed language on “treatment of projects” (projects treated as projects on a Federal-aid highway) be clarified to include the exemption for recreational trail set-aside projects. It suggested stating “(T)he provisions of this subpart apply to all projects funded by the surface transportation block grant program regardless of where the project is located, except that projects funded by recreational trail set-asides are not subject to the provisions of this subpart.”

*FHWA’s Response 2:* The FHWA agrees that clarification is needed. The FHWA has included a sentence that provides examples of Federal-aid program funding categories with ‘treatment of project’ provisions. When using Federal-aid funds from these programs, contracting agencies must include contract provisions noting the applicability of prevailing wage rate requirements.

*Comment 3:* The Minnesota DOT requested clarification on whether the “treatment of projects” provision of this subpart would apply to 23 CFR 646.216(f) authorizing railroad construction by force account or existing contracts.

*FHWA’s Response 3:* The provisions of this subpart do not apply to railroad construction performed by railroad forces or railroad-let contracts.

*Comment 4:* The Alabama DOT commented that in Section IV.3.a., the social security numbers and home addresses should not be included on weekly payroll submissions.

*FHWA’s Response 4:* The requirement to exclude full social security numbers and addresses of laborers and mechanics on the required weekly payroll submissions is discussed in Section IV.3.b.(1). Payrolls and basic records, excluding weekly payroll submissions, shall include social security numbers and addresses of the laborers and mechanics as discussed in Section IV.3.a. This is consistent with the U.S. Department of Labor’s (DOL) regulatory requirements titled *Contract provisions and related matters* in 29 CFR 5.5. The provisions in 29 CFR 5.5(a)(3)(ii) prohibit contractors from including full social security numbers and home addresses on the required weekly payroll

submission and the provisions of 29 CFR 5.5(a)(3)(i) require full social security numbers and home addresses on payrolls and basic records.

Subsequent to the November 11, 2016, Federal Register notice and request for comments announcing FHWA's intent to revise Form FHWA-1273, DOL issued several rulemakings regarding the *Contract Provisions and Related Matters* in 29 CFR 5.5. The FHWA is incorporating these provisions in Form FHWA-1273 with minor editorial changes to match the outline structure and context of Form FHWA-1273. The DOL regulatory revisions provided for an inflation-based adjustment of the liquidated damage rate in 29 CFR 5.5(b)(2) from \$10 to \$26. Form FHWA-1273, Section V.2 also includes a note to see 29 CFR 5.5(b)(2) for future updates to the liquidated damage rate.

Section IX. Implementation of Clean Air Act and Federal Water Pollution Control Act

*Comment:* The Minnesota DOT (MnDOT) recommended identifying the party responsible for reporting violations by adding "(T)he contracting agency must report violations." Since EPA may delegate authority to a State agency, MnDOT also recommended adding "a state authority delegated by EPA" to the list of enforcing authorities. Additionally, MnDOT suggested that the final paragraph related to flow-down requirements be retained.

*FHWA Response:* While FHWA understands Minnesota DOT concerns regarding reporting entities, the proposed language for this section is consistent with the provisions in Appendix II to 2 CFR Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards and will remain unchanged. The FHWA agrees with Minnesota DOT regarding the flow-down paragraph and the following sentence will be added to the final document: "The contractor agrees to include or cause to be included the requirements of this Section in every subcontract, and further agrees to take such action as the contracting agency may direct as a means of enforcing such requirements."

Section X. Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion

*Comment:* The MnDOT commented that the term “in a timely manner” was too subjective to administer properly and suggested providing, instead, “whose payments under an obligation to a tax authority are not current.”

*FHWA Response:* The FHWA does not agree with this suggestion and no revisions are made in the final document. The terms “agreement” and “obligation” do not have the same meaning. The language used in the proposed text was structured to conform to the definition of “tax liability” in the DOT Order 4200.6, *Appropriations Act Requirements for Procurement and Non-Procurement Regarding Tax Delinquency and Felony Convictions*, and is designed to track that definition as closely as possible.

Attachment A—Employment and Materials Preference for Appalachian Development Highway System or Appalachian Local Access Road Contracts

*Comment:* The Alabama DOT requested clarification on the applicability of the Appalachian preference provisions.

*FHWA Response:* The employment and materials preference provisions in Attachment A apply to all construction projects funded under the Appalachian Development Highway Program. Fiscal Year 2012 was the final authorization year for this program; however, some States may have available program balances that have not been obligated or have not lapsed. Therefore, it is necessary to retain Attachment A.

**Final Form FHWA-1273**

Pursuant to 23 CFR 633.104(a), FHWA has updated Form FHWA-1273 to be consistent with existing regulatory requirements. The FHWA published the proposed revised Form FHWA-1273 for public comment on November 28, 2016. After considering all the comments, FHWA has incorporated all appropriate edits into the revised Form FHWA-1273. As such, and in accordance with 23 CFR part 633, subpart

A, the revised Form FHWA-1273, which can be found at [www.fhwa.dot.gov/construction/cqit/form1273.cfm](http://www.fhwa.dot.gov/construction/cqit/form1273.cfm), must be used by recipients and contractors, as applicable under the regulations.

**Authority:** 23 U.S.C. 315; 23 CFR 633.104; 49 CFR 1.85.

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